STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

The People of the State of Illinois, ex rel. Lisa Madigan, Attorney General of the State of Illinois	)	Docket No. 13-0501
Complaint to suspend tariff changes submitted by Ameren Illinois and to investigate Ameren Illinois Rate MAPP pursuant to Sections 9-201, 9-250, and 16-108.5 of the Public Utilities Act.	)	Docket No. 13-0517 (cons.)
Ameren Illinois Company d/b/a Ameren Illinois	)	
Revision to its Formula Rate Structure and Protocols.	)	

INITIAL BRIEF ON BIFURCATED ISSUES OF AMEREN ILLINOIS COMPANY

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I. Introduction

Under the Energy Infrastructure and Modernization Act (EIMA), a participating utility recovers its delivery services costs through a formula rate. The formula rate is fixed. The cost inputs to the formula rate, however, are "updated annually with transparent information that reflects the utility's actual costs." 220 ILCS 5/16-108.5(c). The process is intended to "operate in a standardized manner." *Id.* But Staff proposes a dramatic change to the status quo by defining the "structure" of the formula rate so narrowly that changes to all the formula rate's schedules and appendices, save AIC's two summary schedules, could be proposed, litigated and adopted in any and every update proceeding. If Staff's proposal is adopted, these year-by-year changes to the formula rate structure would prevent the formula rate from operating in a standardized manner.

Moreover, it is unclear why Staff's change is needed. There is no dispute that, under the EIMA, the Commission does not "have the authority in a [update and reconciliation] proceeding … to consider or order any changes to the structure or protocols of the performance-based formula rate approved pursuant to subsection (c) of this Section." 220 ILCS 5/16-018.5(d)(3). Staff's proposal interprets what constitutes the "structure or protocols" to expand what can be changed in an annual update and reconciliation, as opposed to requiring the Section 9-201 process. But Staff does not identify a serious problem that needs fixing with this expansion. Staff does not explain why the status quo needs changing. In fact, as Staff witness Ms. Ebrey explained at hearing, "When Staff does its analysis in these formula rate proceedings, Staff uses its model that it has historically used in rate cases and Staff does not recommend changes to these [formula rate] schedules and apps that are in this template." (Tr. 107.) Moreover, Staff would not as a general course propose changes to the formula rate schedules or appendices. (*Id.*) In other words, Staff apparently does not rely on the formula schedules or appendices or plan to

propose changes to them. Yet the ability to propose changes to the schedules and appendices at will in annual update and reconciliation proceedings is exactly the result of Staff's proposal. (*See* ICC Staff Ex. 8.0, pp. 5-6.) But if Staff doesn't intend to make such changes in every annual update proceeding, and AIC doesn't intend to, it is unclear why debate is even needed over the definition of the formula rate structure.

In fact, debate is not needed because the system works perfectly fine under the status quo. The intent of the formula rate process was to establish the formula, 220 ILCS 5/16-108.5(c); *Ameren Ill. Co.*, Docket 12-0001, Order, p. 4 (Sept. 19, 2012), and then have the annual updates focus on the annual cost inputs to the formula. 220 ILCS 5/16-018.5(d). Any change to the formula, as opposed to changes in inputs, would be addressed in a separate proceeding. 220 ILCS 5/16-018.5(d)(3). In those instances, which have not been extensive, where a proposal would change the formula, such change is addressed separately. *See, e.g. People v. Commonwealth Edison Co.*, Docket 13-0511; *Ill. Comm. Comm'n v. Commonwealth Edison Co.*, Docket 13-0533 (investigating changes to ComEd's formula rate in a separate proceeding outside the annual update.) The Commission recognizes the distinction between Section 9-201 proceedings and annual update proceedings. In fact, this case exists to address certain proposals originally offered in an update proceeding, through a Section 9-201 proceeding. *See generally, People v. Ameren Ill. Co.*, Dockets 13-0501/13-0517 (cons.), Interim Order (Nov. 26, 2013). So, the system works well as it is, and there is no need to consider Staff's changes.

II. Statutory Authority

Section 16-108.5(c) provides:

> A participating utility may elect to recover its delivery services costs through a performance-based formula rate approved by the Commission, which shall specify the cost components that form the basis of the rate charged to customers with sufficient specificity to operate in a standardized manner and be updated annually with transparent information that reflects the utility's actual costs to be

> recovered during the applicable rate year … *Subsequent changes to the performance-based formula rate structure or protocols shall be made as set forth in Section 9-201 of this Act.*

220 ILCS 5/16-108.5(c) (emphasis added).

Section 16-108.5(d)(3) provides:

> The Commission shall not, however, have the authority in a proceeding under this subsection (d) to consider or order any changes to the structure or protocols of the performance-based formula rate approved pursuant to subsection (c) of this Section.

220 ILCS 5/16-108.5(d)(3).

III. Argument

A. Should "formula rate structure" be defined to mean the approved tariff set forth in Ameren Illinois Company's tariffs as Rate MAP-P, Tariff Sheet Nos. 16 – 16.013.

Staff witness Ms. Ebrey proposes that the Commission define "formula rate structure" to mean AIC's currently effective formula rate tariff, which consists of Tariff Sheet numbers 16-16.013, and includes Schedules FR A-1 and FR A-1 REC but no other formula rate schedules or appendices.[1] The definition matters because the Commission does not "have the authority in a [reconciliation] proceeding … to consider or order any changes to the structure or protocols of the performance-based formula rate…" 220 ILCS 5/16-108.5(d)(3). Ms. Ebrey's proposal, if adopted, would unlawfully and materially expand the scope of changes to the structure or protocols of the performance-based formula rate that the Commission could consider in an annual proceeding.

Ms. Ebrey's proposal is counter to the provisions of the EIMA, however, for at least two reasons. First, Staff's proposed definition of "formula rate structure" is too narrow as a matter of

[1] AIC's formula rate tariff includes FR A-1 and FR A-1 REC, an index describing the remaining formula rate schedules, appendices, and workpapers, and general information regarding billing determinants and the operation of the formula rate. *See* Ill. C. C. Sheet Nos. 16 through 16.013.

law. And second, Staff's proposed definition of "formula rate structure" is inconsistent with the statute's requirement that the formula rate operate in a "standardized" manner. 220 ILCS 5/16-108.5(c). Components of the structure could be changed every year within an update proceeding, creating an ever-changing formula rate and potentially burdening parties with litigation of changes to the formula rate schedules and appendices every year.

1. Staff's proposed definition is contrary to Section 16-108.5 because AIC's current Rate MAP-P Tariff does not include all components of the formula rate "structure."

a. The formula rate "structure" consists of more than just the pages in AIC's current Rate MAP-P Tariff.

The formula rate "structure" is broader than Staff's proposed "structure," which would limit the "structure" to only FR A-1 and FR A-1 REC. The language of the Act makes this clear. The EIMA says that, "[a]fter the utility *files its proposed performance-based formula rate structure and protocols* and initial rates, the Commission shall initiate a docket to review the filing." *Id*. (emphasis added). AIC made its initial formula rate filing in Docket 12-0001. To initiate that filing, AIC submitted more than just FR A-1 and FR A-1 REC; it filed schedules and appendices that detail formula calculations, such as AIC's rate base, operating income, common equity balance and its cost of capital. *Ameren Ill. Co.*, Docket 12-0001, Scheds. FR B-1, FR C-1, FR D-1, (filed Jan. 3, 2012). The Commission could not have entered an order approving a revenue requirement to be recovered through the formula rate, absent the schedules and appendices that detail formula calculations, such as AIC's rate base, operating income, common equity balance, and cost of capital.

Likewise, the EIMA provides, "[s]ubsequent to the Commission's *issuance of an order approving the utility's performance-based formula rate structure and protocols*, and initial rates under subsection (c) of this Section, the utility shall file, on or before May 1 of each year, … its

updated cost inputs to the performance-based formula rate for the applicable rate year and the corresponding new charges." 220 ILCS 5/16-108.5(d). The Commission's Order in Docket 12-0001 approved more than just AIC's tariff pages. It approved AIC's formula rate (Rate MAP-P) and components of the formula such as the adjustment for vacation accrual or to projected plant for ADIT. *Ameren Ill. Co.*, Docket 12-0001, Order, pp. 51-53, 199-200 (Sept. 19, 2012). The adjustment to projected plant for ADIT is an instructive example. This formula adjustment is reflected on Schedules FR B-5, line 40, (Ameren Ex. 2.5, p. 8), but *not* on Schedules FR A-1 or A-1 REC. ADIT on projected plant is thus part of the formula rate structure that is not in the tariff. Although the Commission required AIC to file only FR A-1 and FR A-1 REC with its tariffs, the Order's approval was for Rate MAP-P as a whole, "as well as the revised tariffs." *Id.* at 151, 200.

Similarly, the formula rate includes components for a calculation of return on equity (ROE) and a calculation of an ROE collar adjustment. Neither the ROE nor the method for calculating the ROE collar appear on FR A-1 or FR A-1 REC. (*See* Ameren Ex. 2.5, pp. 2-3.) Instead, the calculations of these components of the formula rate appear on Schedules D-1 and A-3, respectively. (*Id.* at 13, 5.) Clearly, these calculations are part of the formula rate structure. But Staff admits that Schedule FR D-1 "would not be considered part of the formula rate structure and protocols." (Ameren Ex. 6.0, p. 12.)

A recent decision by the Fourth District Appellate Court confirms that the formula rate "structure" is broader than the current tariff. The Court ruled that the Commission does not have authority to reconsider, in an annual reconciliation, an adjustment to rate base that it had adopted in AIC's initial formula rate docket, Docket 12-0001. *Ameren Ill. Co. v. Ill. Comm. Comm'n*, 2013 IL App (4th), 121008, ¶ 45 (hereinafter, the Appellate Decision). The Court found that the

language of Sections 16-108.5(d)(1) and (d)(3) prohibited the Commission from reconsidering the initial performance based formula rate in an annual reconciliation. *Id.*, citing 220 ILCS 5/16-108.5(d)(3). This ruling is particularly relevant here because the component of the formula rate that the Court held could not be reconsidered in an annual update proceeding was a rate base adjustment for vacation accrual, an item not found in FR A-1 or FR A-1 REC (or even in the schedules and appendices). (Tr. 112-13.) The finding that the vacation accrual adjustment was part of the "initial performance-based formula rate," which could not be changed because of the EIMA's requirement that "[t]he Commission shall not … have the authority in a proceeding under this subsection (d) to consider or order any changes to the structure or protocols of the performance-based formula rate approved pursuant to subsection (c) of this Section," 220 ILCS 5/16-108.5(d)(3), confirms that the concept of "structure" goes well beyond the narrow definition proposed by Staff. Appellate Decision at ¶ 45.

In fact, Ms. Ebrey's proposal would be directly contrary to the Appellate Decision. The Court made clear that, with respect to accrued vacation reserve, the plain language of EIMA "prohibited the Commission from reconsidering the initial performance-based formula rate during the first annual reconciliation proceeding." At hearing, however, Ms. Ebrey offered a position contrary to the Court's holding when she admitted that, under her proposal, in a future annual update proceeding, a party could propose to reverse the deduction for the accrued vacation reserve and the Commission would have to consider that proposal. (Tr. 115.)

> Q. [T]he Commission would have to consider that issue or consider the issue of accrued vacation reserve in the next update and reconciliation proceeding, correct, if a party made that proposal?
>
> A. The Commission would consider any proposals, yes, I agree with that.

(*Id.*) This is plainly contrary to the Appellate Decision's holding that the accrued vacation reserve could *not* be reconsidered in a reconciliation.

Staff's proposal here asks the Commission to revise the scope of the Act. Staff would have the Commission restrict the "structure" to only FR A-1 and FR A-1 REC, simultaneously expanding the types of proposals appropriate in annual update proceedings, and effectively eliminating the need for, or use of, Section 9-201 proceedings. But the Commission must act consistently with the statute. *In re Illinois Bell Switching Station Litig*., 161 Ill. 2d 233, 262 (1994) (holding that, "as a creature of the legislature, the Commerce Commission derives its authority solely from the statute creating it . . . and any acts it takes or orders it makes inconsistent with that act are void"). This requirement of consistency dictates that the Commission "can neither limit nor extend the scope of a statute." *Outcom, Inc. v. Dep't of Transp.*, 233 Ill. 2d 324, 340 (2009) citing *Van's Material Co. v. Dep't of Revenue*, 131 Ill. 2d 196, 209 (1989) (holding an agency's interpretation of a statutory term "unduly restrictive" and therefore declining to apply it).

b. The "tariff" is not automatically the same thing as the "structure."

Staff's position implies that the formula rate tariff and formula rate structure are the same. (ICC Staff Ex. 9.0, pp. 4-5.) But they need not be. EIMA contains the terms "formula rate," "formula rate tariff," and "formula rate structure and protocols." *See generally,* 220 ILCS 5/16-108.5. These terms are used frequently throughout the EIMA, but they are not interchangeable.

The EIMA states that delivery service costs are "recovered through" the "formula rate." 220 ILCS 5/16-108.5(c). The EIMA also refers to the "formula rate tariff" as being "file[d]" by a participating utility." 220 ILCS 5/16-108.5(b)(1); (b)(2); (c)(6); (d)(1). But the EIMA refers separately to "formula rate structure and protocols."[2] The words "formula rate tariff" never

[2] Notably, the words "formula rate structure" never appear without "protocols" accompaniment.

appear in conjunction with "formula rate structure and protocols." Although the formula rate cost inputs must be updated annually, 220 ILCS 5/16-108.5(c), the EIMA states that the Commission "shall not" have authority in an annual update proceeding "to consider or order any changes to the structure or protocols." 220 ILCS 5/16-108.5(d)(3).

It is "a basic rule of statutory construction that, by employing certain language in one instance and wholly different language in another, the legislature indicates that different results were intended." *In re Marriage of O'Brien*, 2011 IL 109039 ¶ 95, citing *In re K.C.*, 186 Ill. 2d 542, 549-50 (1990) (internal quotation omitted). The word "tariff" has long been a fixture of utility ratemaking, *see, e.g. State Public Utilities Com. v. Terminal R. Ass'n,* 281 Ill. 181, 183 (1917), and the legislature must be assumed to have understood the meaning of the term "tariff" when drafting the Act. *Metro. Life Ins. Co. v. Hamer*, 2013 IL 114234, ¶ 20 (2013) citing *People v. Maggette*, 195 Ill. 2d 336, 349 (2001) ("Where a term is undefined, we presume that the legislature intended the term to have its popularly understood meaning."). The words "formula rate structure and protocols," however, appear for the first time in the EIMA. Use of this new and different language instead of the old, established term "tariff" means use of the term "structure and protocols" does *not* necessarily mean "tariff." The Commission must adhere to the Act, and therefore cannot adopt an interpretation of the Act that would conflate terms the legislature clearly intended to distinguish. *In re Illinois Bell Switching Station Litig*., 161 Ill. 2d at 262.

This is not to say that the tariff cannot be part of the "structure"; in fact, AIC proposes that if the Commission perceives any concern with the status quo, the correct solution is to "define the formula rate structure to include Schedules FR A-1 and FR A-1 REC, *plus* the supporting schedules and appendices." (Ameren Ex. 6.0, p. 6.)

c. There are also formula rate "protocols" that are components of the "structure or protocols" but are not in the formula rate tariff; it is unclear how they fit in Staff's proposal.

The EIMA requires that the approved formula rate include "protocols" that allow the utility to recover incentive compensation, pension and benefits expense, and other items, and amortize charges exceeding $3.7 million that occur as a result of a change in law or a storm.[3] 220 ILCS 5/16-108.5(c)(4)(A)-(I). In establishing what cannot be considered in a reconciliation proceeding, EIMA consistently pairs the words "structure" and "protocols" together.[4] Thus, the concept of "structure" must be considered together with the concept of "protocol."

However, Staff does not consider the "protocols" when proposing to define the term "structure" to be only AIC's formula rate tariff. Staff's "recommendations do not consider changes to the protocols under Section 16-108.5." (ICC Staff Ex. 11.0, p. 5.) But Staff admits that certain of the "protocols" do not appear on the face of the tariff, but appear in schedules other than FR A-1 and FR A-1 REC. (Tr. 110-12.) There are no line items on FR A-1 and FR A-1 REC that account for these protocols. Thus, it remains unclear how, under Staff's proposal, the formula calculations in the schedules and appendices that implement the protocols can or cannot be changed in an annual proceeding.

1. Staff's proposal is inconsistent with the EIMA's requirement that the formula rate operate in a "standardized" manner, because components of the structure could be changed every year.

EIMA requires the performance-based formula rate "shall specify the cost components that form the basis of the rate charged to customers with sufficient specificity to operate in a standardized manner and be updated annually with transparent information that reflects the

[3] These protocols are not itemized in the tariff.
[4] 220 ILCS 5/16-108.5(c)(6) ("structure and protocols," and "structure or protocols"; (d) ("structure and protocols"); (d)(3) ("structure or protocols").

utility's actual costs to be recovered during the applicable rate year." 220 ILCS 5/16-108.5(c). Under the status quo, it does. But, Staff appears to be concerned about "confusion" between the terms "formula rate template" and "formula rate structure" and, as a result, what changes to the formula rate tariff, schedules, appendices and workpapers require Commission approval in a Section 9-201 filing. (ICC Staff Ex. 8.0, p. 5.)

To begin with, it is unclear whether the confusion Staff alleges really exists. The term "formula rate template" is really just shorthand used by AIC to refer to the formula rate schedules, (including both FR A-1 and FR A-1 REC and supporting schedules) and supporting appendices. *See, e.g. Ameren Ill. Co.*, Docket 12-0293, Order, p. 115 (Dec. 5, 2012); *Ameren Ill. Co.*, Docket 13-0301, Order p. 147 (Dec. 9, 2013); *see also, Commonwealth Edison Co.*, Docket 11-0721, Order, p. 179 (May 29, 2012) (indicating that the Commission also used "template" to refer to the formula rate schedules, when it ordered that "Commonwealth Edison Company shall change its formula template in accordance with this Order"). Further, AIC defines the "template" and the formula rate "structure" to be the same thing. (Ameren Ex. 6.0, pp. 3-4.) Whether a party has proposed a change to the "template" or the "structure," AIC's consistent response has been that such a change requires approval in Section 9-201 proceeding. And to the extent that parties have sought to make changes in the formula rate "structure," AIC has worked with them (as in this Docket) to allow those proposals be heard.

And Staff's proposed solution to the alleged problem of "confusion" does not reduce confusion. By contrast, it increases it. The confusion that would result from Ms. Ebrey's recommendations is evident from her own testimony and discovery responses. (Ameren Ex. 6.0, p. 5.) She claims, for example, that "only changes that impact the revenue requirement on Schedules FR A-1 and FR A-1 REC would require Commission approval" in a Section 9-201

proceeding. (Ameren Ex. 6.1 (responses to AIC-Staff data requests 1.10, 1.14, 1.16.).) But many changes to the formula rate schedules and appendices—the very schedules and appendices she would exclude from the Section 9-201 approval requirement for the "formula rate structure"—may impact the revenue requirement on Schedules FR A-1 and FR A-1 REC. (Ameren Ex. 6.0, p. 5.) Her proposal would then simply create confusion about what constitutes a change that impacts the revenue requirement.

At hearing, Ms. Ebrey admitted that a wide variety of changes could now be proposed and litigated in an annual proceeding. For example, she agreed that parties could propose to eliminate materials and supplies inventories or ADIT related to projected plant from the formula rate calculation, (Tr. 110, 116-17), that parties could propose to increase or decrease the $3.7 million threshold for Other Deferred Charges, (Tr. 110-11), and that parties could propose changes to the variables in the ROE collar calculation. (Tr. 117-19.) The Commission would have to consider all of these proposals, the parties would provide testimony and briefing, and the Commission would have to approve or reject them. (Tr. 107-09.) In the end, Staff's position would produce more confusion, and increase the number of litigated issues in each case.

To the extent the Commission has concerns with the status quo, however, the Commission should define "formula rate structure" to include Schedules FR A-1, FR A-1 REC, the supporting schedules, and the appendices. (Ameren Ex. 6.0, p. 17.) This would solidify EIMA's transparent and standardized ratemaking process. Under this approach, it would be clear what changes require a Section 9-201 proceeding.

B. Should the "formula rate template" be defined to mean the formula rate schedules (other than FR A-1 and FR A-1 REC), appendices, and related work papers?

Ms. Ebrey proposes that the Commission define the term "formula rate template" as those formula rate schedules, appendices, and workpapers that are *not* part of the formula rate tariff.

Ms. Ebrey's proposed definition of "template" goes hand-in-hand with her proposed definition of "structure"—in her view, the template is everything that is not part of the structure. (Ameren Ex. 9.0, p. 2.) This definition, according to Ms. Ebrey, would allow the Commission to alter, in an annual update proceeding, the manner in which any calculation not shown expressly on the tariff is conducted.

The Commission need not define the term "formula rate template" at all, since it does not appear in the EIMA. If the Commission chooses to define the term, however, it should not adopt Staff's proposed definition. Staff's proposed definition here does not accord with any prior Commission cases, or even Staff's positions in those cases. Further, Staff proposes to define "template" as a corollary to "structure," but, as discussed above, the Commission must reject Staff's definition of "structure." Therefore, the Commission should also reject Staff's proposed definition of "template," which would be meaningless without its corollary.

In previous formula rate cases, the Commission has used the term "formula rate template" to refer generically to all of the formula rate schedules, and to distinguish the approved methods of calculation (the "template") from the inputs or number values within the calculations. *See, e.g. Commonwealth Edison Co.*, Docket 11-0721, Order, p. 179 ("Commonwealth Edison Company shall change its formula template in accordance with this Order."); *Commonwealth Edison Co.*, Docket 13-0318, Order, p. 87 (Dec. 18, 2013) ("The formula rate template does not provide for the input of adjustments into the formula rate revenue requirement calculations.").

Further, contrary to Ms. Ebrey's current position, Staff has used the term "formula rate template" to refer generally to all formula rate schedules. *See, e.g. Commonwealth Edison Co.*, Docket 13-0318, Staff Init. Br. pp. 67-68 ("Unlike the Commission's traditional revenue requirement schedules, the formula rate template does not provide for the input of adjustments

into the formula rate revenue requirement calculations.") Until this case, the Commission and parties had used the term "formula rate template" to refer generically to the set of schedules and appendices showing the calculations by which the formula rate is derived. Ms. Ebrey's position in this case represents an unnecessary departure from this established practice.

In addition, prior practice has distinguished between the "template" (the schedules and appendices), and the workpapers. This distinction is practical and appropriate, since the tariff, schedules and appendices are fixed, while the workpapers change every time AIC files testimony in an annual update and reconciliation proceeding. (Ameren Ex. 7.0, p. 2.) Over the course of a formula rate update proceeding, there are hundreds of changes to the inputs and calculations described on AIC's workpapers; these changes could reflect AIC's agreement to or acceptance of another party's proposal, for example. (*Id.*) The Commission should thus take care to distinguish the workpapers from the formula rate tariff, schedules and appendices. The calculations laid out on the workpapers are dynamic, and should be allowed to remain dynamic throughout annual update proceedings, regardless of the Commission's conclusion on the other issues before it in this case. The Commission has previously recognized this distinction between workpapers and the template in Docket 12-0001, when the Commission "directed [Staff] to work with AIC to maintain consistency with AIC's . . . formula rate template and supporting workpapers." *Ameren Ill. Co.*, Docket 12-0001, Order, p. 132. This directive indicates the Commission considers the template (the formula rate schedules and appendices), and its supporting workpapers as separate. The Commission should continue to freely allow changes to the workpapers in each annual update proceeding.

C. Should changes to only Schedules FR A-1 and FR A-1 REC require Commission approval through a Section 9-201 filing?

As discussed in Section A above, the EIMA's "structure or protocols" include more than

the tariff sheets, and particularly more than FR A-1 and FR A-1 REC. The "structure or protocols" include all the calculations that the Commission uses to "set the initial delivery services rates under the formula" in an annual proceeding. 220 ILCS 5/16-108.5(c)(6). Since the statute prohibits the Commission from considering "any changes to the structure or protocols of the performance-based formula rate," 220 ILCS 5/16-108.5(d)(3), Staff's proposal to limit what needs to be approved in a Section 9-201 proceeding to Schedules FR A-1 and FR A-1 REC is not consistent with the law.

Staff's proposal to only require changes to Schedules FR A-1 and FR A-1 REC be made in a Section 9-201 proceeding also leaves open the possibility that changes to "protocols" could be made outside a Section 9-201 proceeding. Staff admits that certain of the "protocols" appear in schedules other than FR A-1 and FR A-1 REC. (Tr. 110-12.) Staff argues in testimony that "protocols" in Section 16-108.5(c)(4) of the Act cannot be changed, even in Section 9-201 proceedings. (ICC Staff Ex. 11.0, p. 6.) But Staff fails to explain why the term "protocols" must be limited to the provisions of that Section, and in fact acknowledges that Section 16-108.5(c)(6) allows for "some" protocol changes. (*Id.*) Staff also doesn't explain whether the formula calculations in the schedules and appendices that implement the protocols can or cannot be changed in an annual proceeding. To the extent protocols can be changed in accordance with the law, they must be changed in a Section 9-201 proceeding. 220 ILCS 5/16-108.5(d)(3). But Staff's proposal would improperly allow protocols not reflected in FR A-1 and FR A-1 REC to be changed in an annual proceeding.

Notwithstanding its proposal, Staff appears to agree. "In Ms. Ebrey's opinion, *a change that would have an impact on the methodology for the calculation of the filing year revenue requirement* reflected on FR A-1 or the reconciliation year revenue requirement reflected on FR

A-1 REC would not be ministerial in nature and *would therefore require Commission approval under Section 9-201*." (Ameren Ex. 6.1, p. 2 (Resp. to AIC-Staff 1.16).) But a wide variety of changes could "have an impact on the methodology for the calculation" of the revenue requirement—including changes to schedules or appendices other than FR A-1 and FR A-1 REC.

At hearing, Ms. Ebrey admitted that a party could seek a change in an annual update proceeding that would cause a change in the methodology for the calculation of the revenue requirement, (and so a Section 9-201 proceeding)—effectively an admission that her proposal defines what requires Section 9-201 approval too narrowly:

> Q. And a party could propose to remove line 40a [for ADIT on projected plant] in an annual updated reconciliation; is that right?
>
> A. Once again I'm -- I suppose they could, but the parties have been focused on the actual revenue requirement and not focused on items that appear on the schedules -- line items as they appear on the schedules.
>
> Q. But if that proposal were adopted, that would change -- If the proposal were made and adopted by the Commission, that would change the methodology by which the filing of revenue requirement was calculated, right?
>
> A. Yes.

(Tr. 116.)

Similarly, Ms. Ebrey admitted that, under her proposal, a party could seek in an annual update proceeding to alter the source of variables for the ROE collar calculation, which appears on Schedule FR A-3, and that, if adopted, this type of proposal could decrease the ROE percentage (used to determine if the ROE collar is exceeded). (Tr. 117-19.) Since a change in the ROE collar calculation could certainly "have an impact on the methodology for the calculation" of the revenue requirement, Ms. Ebrey's position is that these changes would require a Section 9-201 proceeding. But it is also her position that this change would also *not* require a Section 9-201 proceeding because they do not appear on Schedules FR A-1 and FR A-1 REC. This contradiction and confusion confirms why Staff's proposal should be rejected.

Instead, the Commission should continue its current practice of considering the reasonableness and prudence of the value of inputs to the formula rate in annual update proceedings, and considering changes to the method by which the formula rate is calculated in proceedings initiated and as required under Section 9-201. *See Ameren Ill. Co.*, Docket 12-0293, Order, p. 103 ("The Act prohibits the ICC from modifying the performance-based formula rate itself, which is intended to protect both Ameren Illinois and ratepayers.")

D. Should the issues raised by Staff be deferred for consideration in the ordered formula rate rulemaking?

Administrative adjudications look back in time to determine the rights of an individual, while rulemakings create regulations that will be applicable to multiple individuals in the future. Here, Staff admits that its proposal to define statutory terms will be applicable to both AIC and ComEd in future formula rate update proceedings. (Ameren Cross Ex. 1SH (response to data request AIC-Staff 1.36).) If the Commission intends that a proceeding will "lead to the establishment of policies, practices, rules or programs applicable to more than one utility," it may, in its discretion, choose to use either rulemaking or contested case procedures, so long as the Commission states its intention to create a generally-applicable rule or policy at the outset of the case. 220 ILCS 5/10-101. Rulemaking proceedings "implement, appl[y], interpret[] or prescribe[] law or policy," with a focus on possible future action by any regulated party, not just a single entity. 5 ILCS 100/1-70; *States Land Improvement Corp. v. Ill. Envt'l Protection Agency*, 231 Ill. App. 3d 842, 846-47 (4th Dist. 1992) (distinguishing rulemaking from quasi-judicial agency action based on the fact that rulemaking is "keyed to possible future action" by regulated individuals). Staff is requesting that the Commission interpret the law in a way that will affect more than one utility's formula rate cases in the future. Thus, in this case Staff is

really requesting a rule, and Staff's request should be considered in the context of a rulemaking proceeding.

As discussed above, Staff's proposal should be rejected. But if it is considered, the Commission should consider Staff's proposed definitions in the context of a rulemaking proceeding. In fact, the Commission has already determined that a rulemaking concerning formula rate issues is appropriate, and has ordered such a rulemaking on multiple occasions. *See Commonwealth Edison Co.,* Docket 11-0721, Order, p. 153; *Ameren Ill. Co.*, Docket 12-0001, Order, p. 151; *Commonwealth Edison Co.*, Docket 12-0321, Order, p. 105 (Dec. 19, 2012).[5] If Staff' proposals must be considered, that is where to consider them.

IV. Conclusion

For the reasons above, Staff's proposed definition of "formula rate structure" is wrong as a matter of law. Staff's proposed definition of "formula rate structure" is also inconsistent with the statute's requirement that the formula rate operate in a "standardized" manner. 220 ILCS 5/16-108.5(c). If Staff's position was adopted, components of the structure could be changed every year, creating an ever-changing formula rate and potentially burdening parties with litigation of changes to the formula rate schedules and appendices every year, and more appeals. Therefore, Staff's proposal should be rejected.

[5] Notably, in Docket 11-0721, Staff opposed initiation of a rulemaking proceeding, arguing that it would be premature until interested parties had "gained more practical experience with formula rates," which Staff indicated should include experience with annual update filings. *Commonwealth Edison Co.*, Docket 11-0721, Staff Brief on Exceptions, pp. 44-45 (May 9, 2012). Now, after all parties have participated in only one formula rate reconciliation proceeding, Staff witness Ms. Ebrey argues that it is an inefficient use of resources to initiate a rulemaking, since the resulting rule may be in effect for between one and five years.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, certify that on March 7, 2014, I caused a copy of the foregoing *Initial Brief on Bifurcated Issues of Ameren Illinois Company* to be served by electronic mail to the individuals on the Commission's Service List for Docket Nos. 13-0501/13-0517 (cons.).

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